Supreme Court, U. S.
FILED
MAY 15 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5705

OTIS TRAMMEL, JR.,
Petitioner

—vs—

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 13, 1978
CERTIORARI GRANTED FEBRUARY 26, 1979

INDEX

	Page
Chronological List of Relevant Docket Entries	1
Indictment	4
Motion for Severance	8
Reporter's Transcript Hearing on Motions	10
Transcript of Trial Proceedings	34
Verdict	36
Judgment and Probation Commitment Order	37
Opinion of Court of Appeals, Filed October 11, 1978	39
Order of the Supreme Court of the United States Granting Motion for Leave to Proceed In Forma Pauperis and Granting Petition for Writ of Certiorari	51

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES

1976

3-10 INDICTMENT
W/A issued to Marshal.

3-29 Memo of U.S. Atty . . . Deft. in custody of Marshal in Los Angeles as of 3/16/76 . . . Scheduled to appear before Magistrate 4/6/76.

3-30 Marshal's return on W/A . . . Deft. arrested 3/16/76.

4-15 Advised by Magistrate's Office (Tassopulos, 798-2523) in Los Angeles, Calif. that hearing scheduled for 4/6/76 has been continued to 5/13/76.

5-6 BOND . . . $10,000 Surety . . . executed 3/18/76 . . . Surety: Cora E. Trammell, 8705 Bandera St., Los Angeles, Calif. Case assigned to J. Winner . . . Arr. set 5/14/76.

5-13 Order Appointing Counsel.

5-14 Ordered (FMW Deft. be arraigned . . . Deft. enters plea of NOT GUILTY . . . Case be set for trial . . . Bond cont. eod 5/17/76.

5-19 Signed (FMW) Order granting oral MOTION made 5/14/76, allowing Deft. to return to Los Angeles where he is employed. eod 5/24/76 c.o.m.

5-21 Letter of Deft. to Govt . . . Re: Rule 31.
MOTION of Deft. for Discovery
MOTION of Deft. for Severance

5-26 Trial set week of 6/21/76.

6-4 Hearing (FMW) All Pending Motions . . . Arguments . . . Ordered: Motions for Bill of Particulars denied in part, sustained in part, & parts are confessed . . . Motion of Deft. Roberts for Investigative Costs is denied . . . HEARING Re: Motion to Suppress set for 8:00 a.m. 6/21/76 . . .

Motion of Deft. Trammel for Exculpatory Information is granted . . . Further HEARING Re: Motions is set for Thurs. 6/17/76 at 8:10 a.m. . . . Recess. eod 6/7/76

6-7 Response to Bill of Particulars. c.o.m.

6-17 Hearing (FMW) Motions con't . . . Witness . . . Ordered: Immunity Motion for Eliz. Trammel tentative but not official. eod 6/18/76

6-21 TRIAL TO JURY (FMW) 1st Day . . . Jurors sworn . . . Witness Keenan takes 5th . . . Court signs Order granting immunity to this witness . . . Witnesses . . . Exhibits . . . Eliz. Trammel granted immunity per signed Order of Court . . . Witness . . . Exhibit . . . Court & Jury to recess until 9:00 a.m. 6/22/76. eod 6/23/76

6-22 TRIAL TO JURY (FMW) 2nd Day . . . Witnesses . . . Exhibits . . . Gov't rests . . . Jury excused until 9:00 a.m. 6/23/76 . . . Court & counsel remain to discuss legal matters . . . Court in recess until 6/23/76 at 9:00 a.m. eod 6/23/76

6-23 TRIAL TO JURY (FMW) 3rd Day . . . Defense rests . . . Closing arguments . . . Deft. Freeman moves for a mistrial or for severance—denied . . . Deft. Roberts moves for a mistrial—denied . . . Court instructs jury . . . Marshal sworn . . . Jury retires to deliberate . . . Court & Jury reconvenes in answer to jury's request to have Court's instructions transcribed & read to them . . . Request granted . . . Jury recessed until 9:00 a.m. 6/24/76 . . . Court recessed. eod 6/28/76

6-24 TRIAL TO JURY (FMW) 4th Day . . . Jury deliberates . . . Jury finds Defts. GUILTY as charged in Ind . . . Jury polled & all answer in affirmative . . . Jury excused . . . Sent. deferred . . . Bond con't . . . Recess. eod 6/28/76
VERDICT

6-25 Cy Reporter's Transcript of Jury Instructions.

7-1 MOTION of Deft. for new Trial. c.o.m.
Notice of Hearing (FMW) Motion for New Trial . . . set for 7/9/76 8:00 a.m. c.o.m.

7-9 HEARING (FMW) Arguments . . . Ordered: Motion for New Trial denied. eod 7/12/76

7-12 Sent. set for 7/16/76 at 9:00 a.m.—FMW

7-16 SENTENCING (FMW) Indet. sent.; Deft. committed for treatment & supervision pursuant to 18 USC 5010(b) . . . Appeal Bond set at $10,000. Surety . . . Deft. granted stay of exec. to 7/23/76. eod 7/16/76

Signed (FMW) Judgment and Commitment. eod 7/16/76

7-21 NOTICE OF APPEAL—Due 8/30/76—Conf. 7/27/76—Served 7/21/76.

7-27 Designation of Record on Appeal by Defts/Pltf.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 76-CR-57

UNITED STATES OF AMERICA, PLAINTIFF

v.

EDWIN LEE ROBERTS, OTIS TRAMMEL, JR.,
JOSEPH FREEMAN, DEFENDANTS

INDICTMENT—Filed March 10, 1976

21 U.S.C., § 952(a), § 963
18 U.S.C., §2

COUNT I

The Grand Jury charges that:

In July 1975 through November 6, 1975, in Denver and Colorado Springs, in the State and District of Colorado, California, Virginia, Hawaii, the Philippine Islands, Thailand, and elsewhere, EDWIN LEE ROBERTS, OTIS TRAMMEL, JR., and JOSEPH FREEMAN, did knowingly and intentionally import and cause to be imported into the United States of America from Thailand and the Philippine Islands, a controlled substance, to wit: heroin, a Schedule I narcotic, contrary to Title 21, United States Code, Section 952(a) and Title 18, United States Code, Section 2.

COUNT II

The Grand Jury further charges that:

In July 1975 and continuously thereafter up to and including November 6, 1975, in Denver and Colorado Springs in the State and District of Colorado, California, Virginia, Hawaii, the Philippine Islands, Thailand, and elsewhere, EDWIN LEE ROBERTS, OTIS TRAMMEL, JR., and JOSEPH FREEMAN, did wilfully and knowingly combine, conspire, confederate, and agree together with each other and with Janice Leverne Keenan, Elizabeth Ann Trammel, also known as "Teen," Ervin B. Barnes, also known as

"Porkchop," Josephine Flewellen, Carmen Rosa, nee Baez Freeman, and Ben Richardson, Jr., unindicted co-conspirators, and with other persons to the Grand Jury unknown, to knowingly and intentionally import heroin, a Schedule I narcotic controlled substance, in violation of Title 21, United States Code, Section 963, and Title 21, United States Code, Section 962(a).

It was further part of said conspiracy to conceal the importation scheme and the heroin from detection by law enforcement personnel.

It was further part of said conspiracy to use commercial and military airlines and flights to facilitate the importation of heroin.

OVERT ACTS

The Grand Jury charges that in furtherance of the aforementioned conspiracy and to accomplish its objects, the defendants at the time and places set forth did commit the following overt acts:

1. During the summer of 1975, EDWIN LEE ROBERTS, as a member of the United States Air Force at Clark Air Force Base in the Philippine Islands, packaged and caused to be packaged, a quantity of heroin while in the Philippines and caused it to be mailed to himself at his parents' address in the State of Virginia.

2. On or about August 31, 1975, OTIS and Elizabeth TRAMMEL, as a member or dependent of the United States Air Force, who were previously stationed at Clark Air Force Base, flew via a military flight from the Philippines to California, carrying a quantity of heroin. On September 9, 1975, they mailed a letter from California to Carmen Baez who is the wife of JOSEPH FREEMAN, and who was stationed at Clark Air Force Base, Philippines. The letter requested that a message be given to "Free" regarding breaking down their "junk" and referring to "30 thousand an ounce."

3. On or about September 11, 1975, EDWIN LEE ROBERTS mailed a letter from Portsmouth, Virginia to Janice Keenan, a member of the Air Force who was stationed in the Philippines. The letter requested that a message be given to "Freeman" about Roberts having sold

"his stuff at $300.00 per one-half teaspoon" and "I need some more."

4. On September 13, 1975, JOSEPH FREEMAN, a member of the United States Air Force and married to Carmen Rosa Baez, also a member of the United States Air Force, flew by way of a military flight from the Philippines to California. There he met OTIS and Elizabeth TRAMMEL. Later FREEMAN also met with EDWIN ROBERTS and ROBERTS assisted him in "getting rid of some of his stuff." On September 29, 1975, JOSEPH FREEMAN and Elizabeth TRAMMEL flew back to the Philippines by way of commercial airlines.

5. On October 20, 1975, Elizabeth Trammel flew from the Philippines to Thailand where she subsequently met Ervin B. Barnes. She purchased a quantity of heroin from Barnes and was instructed by him as to methods of secreting the heroin on her person so as to prevent discovery on her return trip.

6. On September 28, 1975, EDWIN ROBERTS, then stationed at Peterson Field in Colorado Springs, Colorado, wrote a letter to Janice Keenan in the Philippine Islands which included the statement that ROBERTS had assisted FREEMAN in "getting rid of some of his stuff."

7. On or about October 22, 1975, EDWIN ROBERTS wrote Janice Keenan another letter telling her to tell FREEMAN that ROBERTS had not yet sold FREEMAN'S "stuff" and that he had been forced to throw away "two parts of Freeman's stuff" because he had been "stopped and searched by the cops."

8. On or about October 30, 1975, Elizabeth Trammel left Thailand and returned to the Philippine Islands.

9. On or about November 3, 1975, Elizabeth Trammel secreted 4 ounces of heroin on her person for the purpose of importing into the United States. She was driven to the airport in Manila, Philippine Islands, by JOSEPH FREEMAN. The plan was for Elizabeth Trammel to deliver the heroin to OTIS TRAMMEL in Los Angeles, California, where JOE FREEMAN would pick it up and deliver it to EDWIN ROBERTS in Colorado Springs, Colorado. Elizabeth Trammel's flight stopped in Honolulu, Hawaii, where she was searched and the heroin uncovered and she was arrested.

10. On or about November 5, 1975, Elizabeth Trammel arrived in Denver, Colorado, where she placed telephone calls to EDWIN ROBERTS, arranging for her to make the delivery. On the same date, EDWIN ROBERTS went to Stapleton International Airport, Denver, Colorado, where he accepted the delivery of heroin, which had been brought by Elizabeth Trammel from the Philippine Islands to the United States of America.

A TRUE BILL:

/s/ John J. Noble
JOHN J. NOBLE
Foreman

JAMES L. TREECE
United States Attorney

BY: /s/ Rod W. Snow
ROD W. SNOW
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 76-CR-57

UNITED STATES OF AMERICA, *Plaintiff*

v.

EDWIN LEE ROBERTS, OTIS TRAMMEL, JR., JOSEPH FREEMAN, *Defendants*

MOTION FOR SEVERANCE
Filed May 21, 1976

COMES NOW the Defendant, Otis Trammel, Jr., by and through his duly authorized attorneys, Fielder, Mitzner & Wiggins, P.C. and moves this Honorable Court to enter an Order severing the trial of Otis Trammel, Jr. from the other two named Defendants herein and as grounds therefor states as follows:

1. That one of the witnesses endorsed by the Government is an unindicted co-conspirator named Elizabeth Ann Trammel.

2. That Elizabeth Ann Trammel is the wife of the Defendant, Otis Trammel, Jr.

3. That Rod W. Snow, United States Attorney, has advised the defense that he intends to call Elizabeth Ann Trammel as a witness in this case.

4. That although her testimony may be admissible against Edwin Lee Roberts and Joseph Freeman, the other two Defendants in this case, the Defendant, Otis Trammel, Jr., has not waived his right to prevent his wife from testifying against him.

WHEREFORE, the Defendant, Otis Trammel, Jr.,

prays that this Honorable Court enter an Order severing his trial from the trial of the other two named Defendants.

Respectfully submitted,
FIELDER, MITZNER & WIGGINS, P.C.

By */s/* Fred A. Fielder, Jr.
FREDERICK A. FIELDER, JR. #2197
1612 Court Place, #725
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573-1036
Attorneys for Defendant,
Trammel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 76-CR-57

UNITED STATES OF AMERICA, *Plaintiff*

v.

EDWIN ROBERTS, ET AL., *Defendants*

REPORTER'S TRANSCRIPT
HEARING ON MOTIONS
Filed December, 30, 1976

Proceedings before the HONORABLE FRED M. WINNER, Judge, United States District Court for the District of Colorado, commencing at or about 2 p.m. on the 17th day of June 1976, in Courtroom E, United States Courthouse.

APPEARANCES

ROD SNOW, Assistant United States Attorney, appearing on behalf of the plaintiff.

ROBERT L. MALMAN, FREDERICK FIELDER, and ERIC PRINGLE, Attorneys at Law, Denver, Colorado, appearing on behalf of various defendants.

[Vol. I, p. 3] PROCEEDINGS

THE COURT: All right, gentlemen, this afternoon we have 76-CR-57 on assorted motions. You gentlemen may proceed.

MR. SNOW: May it please the Court, Rod Snow on behalf of the government. I believe this afternoon is specifically one motion.

THE COURT: That's good.

MR. SNOW: Determination of the competency for the wife to testify.

THE COURT: All right, fine.

MR. SNOW: We have one minor fly in the ointment, Your Honor, the wife will be granted immunity. I just

talked with the Justice Department this afternoon. The immunity is somewhere between Washington and here in the mails. It's been signed. It was signed the 15th of June. I don't believe it will be any problem with her, if it's no problem to the Court.

THE COURT: All right, let's see how we get along.

MR. SNOW: We would call Elizabeth Trammel, Your Honor.

ELIZABETH TRAMMELL

called as a witness by the plaintiff, being first duly sworn, testified on her oath as follows:

[Vol. I, p. 4] DIRECT EXAMINATION

BY MR. SNOW:

Q Would you state your name for the record, please, spelling your last name.

A Elizabeth Ann Trammell, T-r —

MR. FIELDER: Your Honor, I would like to make a statement at this time. By not objecting to her being called at this time, we do not intend to waive any rights we might have in the future.

THE COURT: Fair enough.

A (By the witness) T-r-a-m-m-e-l-l.

Q (By Mr. Snow) and is it Miss or Mrs.?

A Mrs.

Q Mrs. Trammell, where were you in May of 1975?

A Philippines.

Q Anywhere in particular in the Philippines?

A Yes, Clark Air Base.

Q Is that around Manila?

A Yes, down from there.

Q And how long had you been there as of May, 1975?

A A year and a half.

Q And did you get married in May of 1975?

A Yes, I did, the last day, the 31st.

Q May 31?

A Yes.

[Vol. I, p. 5] Q To whom did you marry?

A Otis Trammell, Junior.

Q And approximately when did you leave the Philippines for the first time?

A Coming to the States?
Q Yes, in the summer of 1975?
A The first of September.
Q Around the first of September?
A Uh-huh.
Q Did you take any trips to Thailand before you came back to the United States?
A Yes, I did.
Q Would you tell us approximately when in time you first took the trip to Thailand?
A It was about the last week in August.
Q And what was your reason for going to Thailand?
A My husband had me go pick up some drugs to bring back to the Phillipines.
Q What kind of drugs?
A Heroin.
Q Did you in fact meet anyone in Thailand and pick up some heroin?
A Yes, I did.
Q Did you bring it back to Manila?
A Yes.
[Vol. I, p. 6] **Q What did you do with it?**
A Took it home to my husband.
Q All right. And did you then come to the United States?
A Yeah, we left the next two days.
Q And how did you come to the United States?
A Through Clark Air Base.
Q And was the heroin brought with you to the United States?
A Yes, it was.
Q And by whom?
A Me.
Q What happened when you got to the United States, where did you first stop?
A Went to Los Angeles to my husband's home.
Q Did you or your husband or anyone else attempt to do anything with the heroin that you had brought to California?
A Before we got to the States or after —
Q After you got to the States.
A Yes.
Q All right. Would you tells us what happened, please?
A We had been back about a week and a half and a friend that we had known, Joseph Freeman, called from San Francisco saying that he had arrived in the States and

that he'd be coming down to Los Angeles and my husband was to pick [Vol. I, p. 7] him up at the airport, which he did.

After Freeman had got there and we got settled and all, two days later we set out with the heroin, going to San Bernardino, my husband and Mr. Freeman attempted to sell it there, but they didn't. We stayed there about three or four days.

Then we went to San Diego. Some more of Joseph Freeman's friends there. They weren't able to sell it there.

Sergeant Freeman then went to Virginia, supposedly to sell it.

Q Were you with them when they were attempting to sell this in San Bernardino and San Diego?
A Sometimes.
Q Was anything said by either one of the two parties about two other people wanting to buy it or wanting to sell it or anything.
A Was anything—what was that?
A What happened when you were with them and they tried to sell it?
A Well, Sergeant Freeman had been stationed around those areas before he took his overseas assignment, so he knew friends there, supposedly, and it was just almost like out asking—out-and-out asked in conversation, did they know anybody who might be interested in buying some or did they know where they could sell it.
[Vol. I, p. 8] **Q When they said "some", did they use any particular word for the drugs?**
A Smack.
Q Smack. After you were unsuccessful in Southern California, what if anything did you do?
A Me and my husband left San Diego and went back to Los Angeles.
Q What happened to the drugs?
A One portion of it, my husband tried to sell to his—somebody that was related or in his family, to his sister.
Q All right. And was he successful in doing that?
A The guy took it, but it turned out that my husband didn't get the money that he was supposed to for it.
Q How much did he get?
A $150.
Q For how much did he give?
A An ounce, a full ounce, I believe.
Q An ounce. All right. What happened to the other, did Mr. Freeman take any?

A That was —

THE COURT: Let me interrupt. I am confused.

MR SNOW: Yes, Your Honor.

THE COURT: How much of this does she know as a result of observation and how much does she know as a result of communications made to her by her husband?

[Vol. I, p. 9] MR. SNOW: I will go back, if I may, and clarify that.

THE COURT: Fine, cause I think it makes some moderate degree of difference.

MR. SNOW: Very well, Your Honor.

Q (By Mr. Snow) Let's go back to when you and your husband first arrived in California from the Philippines and you had the drugs with you, okay?

A (Witness nods head)

Q What specifically did you see, versus what you heard? Do you understand what I'm saying?

A That I gave it to him and he kept it in his house.

Q All right.

A After we got there.

Q All right. Now he talked about—after Joseph Freeman arrived, did you hear Joseph Freeman and your husband discuss what was to be done with that heroin?

A No, not right then. Just that they were looking for a buyer.

Q They were looking for a buyer. Now was this a conversation that you heard or what, that they were looking for a buyer?

A Well, yeah, they never did just point out or say anything while I was around.

Q They didn't say anything about it while you were [Vol. I, p. 10] around?

A No.

Q What was it that you either saw or heard next, then, regarding to go to Southern California?

A That maybe some of his friends knew somebody that he could sell it to.

Q This is what Joseph Freeman was saying?

A Yeah.

Q And was your husband present when he was saying that?

A He was talking to my husband when—deciding on what they were going to do with it.

Q Was this in your presence?

A Yes, it was.

Q Was anyone else present?

A No.

Q Where did this take place?

A My husband borrowed his father's mobile home for us to go to San Diego and San Bernardino.

Q All right, and did you ride to San Bernardino with your husband?

A Yes, I did.

Q Was anyone else present?

A Joseph Freeman.

Q While you were on your way to San Bernardino, were there any conversations regarding, specifically, drugs?

[Vol. I, p. 11] A Not that I remember.

Q Did you see the drugs on the way to San Bernardino?

A Yes.

Q Who had them?

A He stored them in the mobile home.

Q Who is "he"?

A My husband.

Q Did you see him do that?

A Well, I knew where he had put them.

Q Did you actually see it yourself?

A Yeah, I guess you could say that.

Q I am sorry. I didn't hear.

A Yes.

Q Yes, you saw them yourself. Did you see him put them there or you just where they were?

A I saw where they were.

Q Now when you got to San Bernardino, did you see anyone take them from there, take them outside the mobile home?

A Did anyone do what?

Q Did anyone take them from the mobile home to take them outside and sell in San Bernardino?

A No, no—no.

Q Did you go with anyone or hear anyone solicit to purchase smack?

A During that time my husband and Freeman talked to [Vol. I, p. 12] his friends and, you know, just asked did they know anybody.

Q Was this in your presence?

A Yes—well, it was an open conversation.

Q By open, do you mean there was more than you and your husband and Mr. Freeman?

A Yes. The people that Mr. Freeman knew.

Q And did your husband take part in those conversations?

A Yes, he did.

Q All right. Now when you got to San Diego, was this same type of thing repeated?

A Yes, but his friend there told him he didn't want to have anything to do with it.

Q Who was his friend? Was it Mr. Freeman's friend or your husband's?

A Yes, Mr. Freeman's friend. I got a chance to meet him, though. He's from Chicago also. He's in the Navy.

Q Were you present when he told Mr. Freeman that he didn't want anything to do with the smack?

A Yes, and his wife was, also.

Q Was your husband?

A My husband, too.

Q All right. Now as to when Mr. Freeman took the drugs, did you see him actually take them?

A No. I was only under the impression that he was taking it to Virginia.

[Vol. I, p. 13] Q Did he tell you that or did you overhear him tell your husband that?

A Overhear him and my husband talking, and me being there.

Q Was that in the mobile home or somewhere else?

A In the mobile home and in his friend's house.

Q Was anyone else present besides the three of you when that was being discussed?

A Not that portion, I don't think.

Q All right.

A She—his wife knew that he was going to Virginia. She knew that we had heroin so I suppose she did know.

Q Was she present, Freeman's wife?

A No. I'm speaking of Richard's wife, his friend.

Q Oh, all right. So was Richard present when there was discussions about going to Virginia?

A Yeah, because him and my husband took Freeman to the airport.

Q So, did you got to the airport?

A No, me and his wife stayed home.

Q Did you see your husband get into the car to take him to the airport?

A Uh-huh (witness nods head).

Q Did you see the transfer of drugs at any time?

A Not then.

[Vol. I, p. 14] Q Did your husband tell you that the drugs had been transferred?

A Yes.

Q Did anyone else tell you that they'd been transferred, did Freeman, for instance?

A He didn't have to, they weren't in the mobile home any more.

Q All right.

A That's the last that I seen them.

Q Do you know precisely when they left the mobile home? Were you present when they were there one time and the next time they weren't?

A No. When—as far as them taking it out and getting ready to—him getting ready to fly to Virginia that night, no. I didn't see that.

Q All right. Did you and your husband have any conversations while Mr. Freeman was gone regarding what was going to happen to the drugs that he had taken to Virginia?

A He was saying that he hoped that he got the money for it.

Q All right. Did Mr. Freeman come back to California?

A Yes, he did.

Q Did you see Mr. Freeman back in California?

A Yes.

Q Did you see if he brought any money back?

[Vol. I, p. 15] A Yes.

Q What did you see happen with money?

A He gave it to my husband.

Q You saw him give money to your husband?

A Yes.

Q How much?

A It was $3500.

Q $3500?

A (Witness nods head)

Q Did he have any conversations with you and/or your husband at that time when he gave over the money, as to where he had gotten it for instance?

A That he had seen Ed in Virginia.

Q Who was Ed?

A Ed Roberts.

Q Okay, did you know who Ed was?

A Yes.

Q Who was Ed?

A Well, he's a friend of mine that was in the Air Force, too. He lived next door to us.

Q Where?

A In the Philippines.

Q All right. So Mr. Freeman told your husband and

you—was he talking to you at the same time or was it just a conversation between the two and you just happened to be [Vol. I, p. 16] there?

A I'd been around. I'd always been around when they were talking.

Q So he told your husband he met Roberts and that's how he got the money?

A (Witness nods head)

Q Did he tell you why he had $3500 from Mr. Roberts?

A From the sale of drugs.

Q Was there any discussion at that time as to what was going to happen to the $3500 that would involve your action?

A Yes, my husband say he wanted me to go back over again, since that he had lost that ounce with that guy that he had messed around with and —

Q Did any of this conversation take place with Joseph Freeman present?

A Yes.

Q So your husband wanted you to go back to the Philippines with Joseph Freeman?

A Right.

Q And did you do that?

A Yes, I did.

Q Did you see who paid for the tickets?

A My husband paid for them.

Q For your ticket and for Mr. Freeman's ticket?

A Yes.

[Vol. I, p. 17] Q What happened when you got back to the Philippines?

A Sergeant Freeman was in process of moving from an apartment that he was staying in across the street to a new house. So I stayed with him about two days and then he made arrangements for me to stay with some friends that I also knew, because he didn't have his house furnished. He had only one accommodations for him and his wife, a bed, so I stayed with friends.

Q Did you make another trip to Thailand?

A Yes, I did.

Q Did anybody give you instructions as to what you were supposed to do when you got there?

A My husband and him had told me to just bring it like I had before when I went the first time.

Q And when they told you this, did both of them tell you this together or separately?

A I can't really remember.

Q All right. Did you in fact make another trip?

A Yes.

Q And did you pick up more heroin?

A Yes.

Q And what did you do with it?

A I brought it back to the Philippines.

Q All right. And did you see Mr. Freemand again when you brought it back?

[Vol. I, p. 18] A Immediately after I returned.

Q Did you have any conversation with him regarding the heroin?

A He just inquired about how my trip was and what I did. He'd keep it, make sure everything was okay.

Q By keeping it, you mean the drugs?

A Right.

Q Did you give the drugs to him?

A Right.

Q All right. Did you get the drugs back from him at any time?

A Two days later.

Q Under what circumstances? Why did he give them back to you?

A He was—wanted me to bring them to the States. He had planned on coming back with me. That's what he told my husband before we even came over together, that he would take care of me, and you know, kind of make sure nothing happened to me and that he would return back to the States with me after I had made the pick up.

That same day that I had flew in from Thailand again back to the Philippines he said that he didn't think he'd be able to come back with me, but he would return in a couple of weeks.

Q Did he tell you what you were supposed to do with [Vol. I, p. 19] the heroin?

A Well, he hadn't discussed it with my husband, but since my husband goofed, he wanted me to take them to Mr. Roberts, but I told him that I'd be stopping to see my husband before I went—came to Denver, because at that time that's where Mr. Roberts was.

Q Did you leave the Philippines and come to the United States?

A Yes.

Q Did you get stopped in Hawaii?

A Yes, I did.

Q Were you searched?

A Yes.

Q And were the drugs found?
A Yes.
Q Did you then come to the United States in company with some agents and deliver the drugs to Mr. Roberts?
A Yes, we did.
Q Where did that take place, the delivery?
A Stapleton Airport.
Q All right.
MR. SNOW: May I have a moment, please, Your Honor?
(Discussion off the record between Mr. Snow and advisory witness.)
MR. SNOW: May it please the Court, there are a [Vol. I, p. 20] great deal of detailed questions that we can go into, but for the sake of the hearing, I don't believe it's necessary. I have given the Court, I believe, the gist of her testimony and defense counsel has got a copy of her previous statements. The government's prepared to have cross-examination and to argue basically on that.
THE COURT: Your may cross-examine.
MR. FIELDER: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. FIELDER:
Q You've indicated in a statement previously supplied to us, that you're a user of heroin, is that right?
A I smoked heroin before.
Q Quite a bit?
A Depends on what you mean, quit a bit.
Q Well, maybe a hundred times while you were in the Philippines?
A Not—not a hundred times. It makes you sick.
Q Kind of makes your head funny, too, doesn't it?
A (Witness nods head)
Q What would you say, 75 times?
A I'd say from the time I started associating with my husband up until the time we got back to the States.
Q All right. So that was for a period of about a [Vol. I, p. 21] year, year and a half?
A About nine months.
Q About nine months, all right. Now, you indicated that you were married to your husband on 31 May 1975, is that correct?
A Right.
Q And you're still married to him at this time?
A Yes, I am.

Q You were married in what place in the Philippines?
A We were married at Bible Baptist Church, downtown Angeles City.
Q All right, now you were given some kind of a misdemeanor deal in Honolulu, is that correct?
A Right.
Q You entered a plea of guilty to that?
A Right.
Q All right, now, evidently, there has been some other grant of immunity that has been given to you, is that right?
A No.
MR. SNOW: Please the Court, the immunity has not been specifically granted yet, as I explained.
THE COURT: From my understanding, Mr. Snow's statement is that he's been assured that the Justice officials of the government will grant immunity and when the documents arrive, it will presumably be presented to me that this has [Vol. I, p. 22] been told to the witness and that the witness is testifying in reliance upon a grant of immunity. I don't think there's been any formal grant at this time.
MR. SNOW: That's correct, Your Honor.
Q (By Mr. Fielder) I meant—you understand that a grant of immunity is going to be given to you then, is that correct?
A Right now I don't even know what that is.
Q Well, they tell you you couldn't be prosecuted for anything you're stating here today.
A I was told when I was apprehended that if I pointed out the people and made a bust that was successful, that, you know, I'd get misdemeanor. It wasn't really a promise. They just said misdemeanor and probation and—but I'd have to fully cooperate during this whole thing involved.
Q All right, then in addition to that, thought, did he tell you anything you state here now while testifying here in Court today or in the future, if you testify in front of a jury, you wouldn't be prosecuted for anything that comes out of that?
A Right.
Q He's told you that?
A (Witness nods head)
Q Did he tell you you could lie and that you wouldn't get prosecuted for that?
[Vol. I, p. 23] A No, I was to tell the truth and only the truth.
Q Okay. Now you've indicated that on two separate occasions, I think the first time was in the latter part of August, 1975 you carried heroin back into the United States?

A Yes.
Q Where did you carry this?
A On my body.
Q Where on your body?
A Underneath my underwear.
Q All right. Now do you recall writing a letter on the 9th of September, 1975 on which your husband also wrote some note on a separate page. Do you recall doing that?
A After me and my husband returned to the States, I wrote my friends back in the Philippines, Carmen Ann Freeman especially, letting them know that we had gotten to the States all right, and just what we were dong.
Q All right. And you indicated in there something about this selling heroin, is that correct?
A (Witness nods head)
Q That was done—excuse me.
A I don't remember the wording that I might have put, but I don't think I mentioned drugs.
Q All right. And that was done in your own handwriting, is that correct?
A Right.
[Vol. I, p. 24] Q Now did you then at some point ask your husband to put an insert in there? He wrote a separate paragraph in there, didn't he?
A That was to a maid. That might have been to the maid. We was real close to our housegirl. Well, we wrote her a letter. That's the only one I remember writing.
Q Well, did he include in this letter to Carmen Baez Freeman a separate note?
A No, not one that I mailed out.
Q All right. Then the entire letter was in your own handwriting, is that correct?
A (Witness nods head.)
Q Nobody else was present when this letter was written or discussed, were they?
A My husband was there with me.
Q Just the two of you?
A Yes. We were watching TV one night and I wrote it.
Q All right. Now who is Janice Laverne Keenan?
A She's a friend of mine. She moved in next door with Mr. Roberts during the time that me and Carmen Ann Freemen and my husband was staying there.
Q And this was in the Philippines?
A Right.
Q And what part did she have in this entire transaction?
A After I returned back from Thailand to the Philippines [Vol. I, p. 25] the second time—the second time, the day also that I arrived when I gave Mr. Freeman the drugs, he asked did I see Jan, meaning did I see her in Udorn, Thailand; and I told him no. And he said I should have seen her. He don't know how I missed her, that she was there, too, to see the same person, I suppose, that I see when I was there.

Q Who is Pork Chop?
A That's Mr. Barnes. Ervin Barnes.
Q Who is he?
A The friend in Thailand that I picked the drugs up from.
Q He was the supplier of the drugs in Thailand?
A He got them from a Thai national. I had—when I got there, after I had been there a couple days, well, he was staying downtown with his girfriend and another Thai national came over, a male, with three ounces, but I think he had told him previously that it was for four, but he only brought three and that he'd pick up another one later.
Q Was the name of Barnes given to you by your husband?
A Yeah, and he, you know, I knew Barnes. After he mentioned him and talked about him, I happened to be stationed in Del Rio, Texas, during '72 up until '73 and occasionally I got to meet Mr. Barnes and his wife. I didn't get to know then. I had seen him. I really hadn't even talked to him for a length of time.
[Vol. I, p. 26] Q All right.
A But I knew him.
Q He, evidently, was stationed in Thailand at this particular time?
A Yes.
Q Your husband had mentioned his name to you?
A Right.
Q As a guy to go to to get the heroin?
A Yes.
Q Was anyone else present when you husband gave you this information?
A Sergeant Freeman.
Q You were all together then?
A Carmen, too, but she wouldn't be, you know, really—I don't think listening to that much what they were saying.
Q Who was Josephine Flewellen?
A Yeah. She is a dependent wife that I got to meet during my tour of the Philippines.
Q She was in the Philippines, also?

A Yes.
Q Her husband is in the military?
A Right.
Q What part did she have in this?
A Only that she accompained me and Mr. Freemand and a girlfriend that I had stayed with, Marilyn Crackett, to the [Vol. I, p. 27] airport in Manila to come back to the States.
Q And who is Ben Richardson, Junior?
MR. SNOW: May it please the Court, at this time we would object. I think it's getting afield from the motion.
THE COURT: Sustained. This hasn't got anything to do with what's before the Court. This is just a discovery deposition now.
MR. FIELDER: Well, Your Honor, I thought I might possibly get into areas that were privileged. This is the only thing I have seen he was going on. I have seen nothing yet—
THE COURT You do anything you want to get into the other areas of privilege, but let's limit to that. There is not going to be a discovery deposition in a criminal case.
MR. FIELDER: Thank you, Your Honor.
THE COURT: If you wish to ask about communications between husband and wife, outside the presence of a third person, you go right ahead and ask to your heart's content, but the identity of people doesn't matter.
If the communications were made in the presence of John Doe, that is all they have to show and who John Doe is doesn't matter unless there's a dispute as to whether there was a third person present.
MR. FIELDER: Very well.
Q (By Mr. Fielder) On your trip back to the United [Vol. I, p. 28] States after you'd gone over there, on your second trip back, all right? Again, at that time—at the time you were apprehended, had a quantity of heroin with you, correct?
A Right.
Q Now that plan at that time was to deliver the stuff to Roberts in Denver or was it to deliver it to Otis in Los Angeles?
A Freeman had just said to take it to Ed, not to let Otis, you know, just do away with it. Because he had messed up the first time. And he only discussed that I think with me, not with my husband.
Q All right, you had a discussion with your husband prior to going back over there, though, is that correct?
A (Witness nods head)

Q And your husband paid the money for the air fare?
A Right.
Q That was our of the money you obtained from selling it back east?
A Right.
Q All right. You had a discussion with your husband at that time as to where you were to deliver the stuff once you get back to the States?
A No. See Freeman had told Otis that he was going to come back with me. So Otis was just thinking that both of us would probably come back to L.A., I guess.
[Vol. I, p. 29] Q So there was no prearranged plan?
A No.
Q Did your husband ever tell you that Roberts had notice that they were coming back to Denver and it would be delivered to Roberts?
A No.
Q Now, on your first trip back with your husband, you had the heroin in your possession and you discussed with him at that time what you were going to do once you got back, how you were going to sell it?
A My husband had told me the reason why I guess I did it, he had told me that he already know—knew people at home that had dealt in smack and it wouldn't be—he was saying it wouldn't be no problem, you know, to get rid of it when we got back.
Q All right. This was in conversation between the two of you on the way back home?
A That was before—before he even sent me over to Thailand.
Q I am talking about the—before the first trip back.
A Before the first trip?
Q Before you went to Thailand, this occurred?
A Right.
Q When did this occur and who else was present?
A Only him and me in our bedroom in the Philippines.
[Vol. I, p. 30] Q Just the two of you and nobody else?
A Right.
Q Now was this ever discussed, that same conversation in the present of anybody else?
A Yeah, he told Freeman that he knew some heavy people in L.A. that it wouldn't be no problem. He made it sound, all you have to do is, if you just have some, and we get back to the States he's sell it and just make a whole lot of money.
Q All right, now, regarding that first sale, that was

made back east, your husband then communicated to you the fact that there had been a sale, is that correct?

A We didn't know that there had been an actual sale and that it had been successful, unless Freeman came back with the money.

Q All right, then he appeared in the present of both of you, then, is that right?

A And his family and my husband's family.

Q With the $3500?

A Yes, but my husband's family didn't see the money. Only me and him, and Freeman.

MR. FIELDER: Excuse me one second, Your Honor.

Q (By Mr. Fielder) All right, no on the first trip back, did your husband ever mention to you the name of Roberts as a possible receiver of these items?

A No, he didn't.

[Vol. I, p. 31] Q On any other occasion, did this occur?

A We only found out about Ed when Freeman came to the States, as far as him being able to make a sale.

Q All right. Now, you've indicated then that you had the marriage to your husband 31 May 1975, and you are presently married to him at this time, is that correct?

A Yes, I am.

MR. FIELDER: All right, I have no further questions, Your Honor.

THE COURT: Further cross-examination. Redirect.

MR. SNOW: Just a couple, if I may, Your Honor.

REDIRECT EXAMINATION

BY MR. SNOW:

Q As to—you were asked on cross-examination, you were married on the 31st of May 1975, is that correct?

A Right.

Q Did any conversations take place regarding drugs involving your husband and Mr. Freemand and Mr. Roberts before the date of your marriage?

A No.

Q Did you at any time overhear them discuss anything about bringing some smack or heroin back to the United States?

A No, only that it would make a lot of money if they did.

[Vol. I, p. 32] Q I'm sorry, explain that please.

A There had been conversations for a long time, a lot of people saying that there could be a lot of money made off of it.

Q At any time did these conversations involve your husband?

A Yeah, he was around.

Q Mr. Freeman?

A Right.

Q Mr. Robert?

A Ed—Ed didn't come over our house. If he came over, it was only to smoke or something. He didn't say anything in front of me as far as a transaction.

Q What is the status of your marriage now?

A Just married.

Q Are you seeking a divorce or are you about to get a divorce or anything like that?

A He just said that I would go my way and he would go his.

Q By "he" do you mean your husband?

A Right.

MR. SNOW: Thank you. No further questions, Your Honor.

THE COURT: All right, is there any further cross-examination?

[Vol. I, p. 33] MR. FIELDER: No, Your Honor.

THE COURT: Do you want to argue about it or what do you want to do?

MR. FIELDER: Well, yes.

MR. SNOW: May the witness step down, Your Honor?

THE COURT: Yes, you may step down.

(Witness excused)

MR. FIELDER: Your Honor I would just cite the case of *United States of America v. Apodaca*, 522 F.2d 568, decided August 22, 1975, the Court went into two areas of this privilege. I think Mr. Snow has succeeded in invading one of the areas, but hasn't succeeded in invading the other. The first area being if there are privileged communications between the husband and wife and possibly another person is present or they are disclosed to somebody else, then you can't raise the privilege.

The second area of it now is we have a right to prevent a spouse from testifying—Otis has the privilege of preventing Elizabeth from testifying unless he gets on the stand.

THE COURT: No, you're confusing a statute similar to the Dead Man's Statute in Colorado with a spousal privilege

statute. In Colorado—and I decline to comment whether this is or is not applicable in the federal court in Colorado. I'd [Vol. I, p. 34] just as soon avoid that problem—let's assume we're in a Colorado state court, you can prevent a witness from even being sworn, from stating their name, if you're objection arises under the Dead Man's Statute. But that is a totally different concept than privilege.

And the reason for that is this: The Colorado statute says that under the Dead Man's Statute, the witness is not competent. There is nothing in any common law privileges which goes to the competency of the witness. It goes only to the right of the witness to testify.

So I do not agree with you on a husband and wife privilege statute. If you were here under the Dead Man's Statute, I would have to face up to the very difficult question of whether that Colorado competency statute does or does not apply in the federal court. I have never had to pass on it. I have argued the matter as a lawyer to four different district judges, two of them rules one way and two of them ruled the other, and I've argued both sides of it. So I know a little bit about it.

I can't accept your argument.

MR. FIELDER: Referring, in addition to the *Apodaca* case, to the U.S. Supreme Court case of *Hawkins v. United States*, 358 U.S. 74, which states the purpose of this is you should not inflame an existing marriage by having one spouse testify against another, it even—

[Vol. I, p. 35] THE COURT: No, no, I don't agree with you. I think it says you should not inflame an existing marriage by having one spouse testifying against another as to the confidential communications made during the course of the marriage.

I do not think the case in any way changes the long established rule that the confidentiality does not exist where the communication is made in the presence of a third person, and I do not think it changes the established rule that there is no confidentiality as to acts observed.

It is limited to communications, oral or written, or, I suppose, by sign language. I suppose there would have to be that qualification to acts observed. If the act was intended to be a communication, I suppose the confidentiality would apply to that.

But I do not agree with you that the long recognized concept that you should not destroy a marriage by having one spouse testifying against another as to something said in

confidence, I cannot agree that it means they cannot testify where the confidence has been breached.

MR. FIELDER: Well, yes. But, Your Honor, in that type of situation these privileges that he brings out would even sustain, would survive, an existing marriage.

I'm talking about a marriage that is in existence and valid at that particular time.

THE COURT: So am I. So am I.

[Vol. I, p. 36] MR. FIELDER: And this *Apodaca* case makes a clear distinction between these two and it gives him an absolute right to keep her off the stand unless he consents, then these are the words they use in that case.

THE COURT: I don't agree with you.

MR. FIELDER: Well, Your Honor, that is all I have to argue. I am relying on these cases, obviously—

THE COURT: All right. Well, gentlemen, I will make a ruling that counsel are going to have to, in utilization of their own questions, apply. As far as I am concerned, the witness can testify to any act observed by the witness before or during the marriage, with the qualification that if the act was intended as a communication, then the witness can testify to that act only if the communication was in the presence of a third person.

That is, if there were a motion between the witness with her hand indicating to the defendant that he should come forward or that he should stop or that he should get down, to hide, that I would regard as an act intended as a communication.

Any other act observed by the witness, she can testify to. The witness can testify to any communication made or during the marriage, which was made in the presence of a third person, as long as the presence of that third person was known by both of the parties to the marriage.

I do not suggest that there could be a waiver of the [Vol. I, p. 37] confidentiality if you hid a person in the room to overhear a conversation. I don't mean that. But where the communication is made in the presence of a third person, whose presence is apparent to both husband and wife, there is, as I see it, no privilege.

Now the government will be held strictly to not asking any question about conversations which do not come within that exception. That is, if the government knows of a communication made in private between husband and wife, you're not going to be permitted to go into that, if it was made out of the presence of anybody else.

If the defendants want to go into that, they are going to get in trouble, if anybody does it accept the defendant whose wife is involved. Or we're all going to be in trouble.

If you're going to do that, then I suppose we have got real *Bruton* problems and we probably will have to order severances.

If the defendants intend to do that, I want them to so state now, because if the defendants intend to go in to something they learned about that is a confidential communication, if anyone other than the husband intends to go into that then I think we would have real problems and I think that we'd have to face up to them now or have a mistrial and I want to know now if that's going to happen.

[Vol. I, p. 38] MR. MALMAN: Your Honor, may I approach the bench on behalf of Mr. Roberts:

THE COURT: Sure.

(At the bench)

MR. MALMAN: This refers to the motion for issuance of a subpoena and I don't mind that Mr. Snow is here because I did talk to Miss Keenan in the Phillipines. She did make some statements to me that, in my mind, would tend to exonerate Mr. Roberts of some of the charges in the indictment, but she said she was subpoenaed by the people and she was being brought to Denver. If that's the case, I don't need to subpoena her.

THE COURT: All right, fine.

MR. SNOW: She is here.

THE COURT: She is here.

MR. MALMAN: She is here in town?

MR. SNOW (Nods head)

(In open court)

THE COURT: Do any defense counsel intend to go into communications between husband and wife?

MR. PRINGLE: Your Honor, from any information we have at this time, we do not.

MR. MALMAN: Your Honor, I am not sure at this time if the confidential statements between Mr. and Mrs. Trammell would apply to my client, Mr. Roberts.

THE COURT: What do you mean, you haven't got any [Vol. I, p. 39] privilege.

MR. MALMAN: No, but I'm saying—

THE COURT: Mr. Roberts doesn't have any privilege as to what Mr. Trammell told his wife.

MR. MALMAN: But if I were forced to cross-examination to get into that, then it would certainly affect Mr. Trammell.

THE COURT: Now wait a minute. Get into what?

MR. MALMAN: Get into what Mr. Trammell told Mrs. Trammell about Mr. Roberts.

THE COURT: In confidence? Mr. Malman, if you're intending to to do that, I have no choice. We will set your defendant for trial separately first. And we'll get him out of the way. I can't see how that could possibly help you.

MR. MALMAN: Well, Mrs. Trammell—

THE COURT: And I can't see how it would help your client. What he said about her or your client, hasn't got anything to do with it. But I'm not going to risk error in this case. I think it's a little wierd, but that's all right.

MR. MALMAN: Mrs. Trammell made quite a few assumptions today that she supposed that Mr. Freeman—

THE COURT: Just tell me, are you going to do it? Are you going to do it?

MR. MALMAN: I don't know if it's going to be necessary to do it. I do think there's a good possibility.

[Vol. I, p. 40] THE COURT: Let me know before the trial starts.

MR. MALMAN: It's possible that I may have Mr. Roberts take the witness stand.

THE COURT: I want one thing understood. I want that question answered before the trial starts and if it isn't and the trial starts and I'm forced to declare a mistrial, the entire cost will be assessed against you personally. Now is that clear?

MR. MALMAN: Yes, it is, Your Honor.

THE COURT: All right.

MR. MALMAN: I would also make known to the Court that there's a good possibility that Mr. Roberts would take the stand and I think the other defendants might have something to say about that.

THE COURT: Why? It's conspiracy, isn't it?

MR. MALMAN: Well, I just want to make it known so that the Court and the other defendants—

THE COURT: Well, it's a conspiracy, isn't it?

MR. MALMAN: It's allegedly a conspiracy.

THE COURT: All right, then *Bruton* doesn't apply, does it, to a conspiracy case? Does it?

MR. MALMAN: No, it doesn't.

THE COURT: All right. So what's your problem?

All right, now when are you going to be able to advise United States Attorney and the Court as to what you're [Vol. I, p. 41] going to do on going into these confidential communications?

Mr. Snow, do you agree with what I am saying?

MR. SNOW: I do, Your Honor.

THE COURT: All right, when are we going to be advised?

MR. MALMAN: Well, I have spoken to one of these witnesses that's a witness, Mrs. Keenan.

THE COURT: It's set for Monday morning.

MR. SNOW: Right, Monday morning we have a motion to suppress.

THE COURT: Well, I guess you'll know by 8 o'clock and we'll either go to trial against one of them or all of them and we can keep the jury occupied. But we'll go against yours first, if we don't go against all of them, so you be sure to be ready.

MR. MALMAN: I will be ready, Your Honor.

THE COURT: All right.

MR. SNOW: Your Honor, may I ask if there were a severance, would we try both cases in the same week. I know the Court has a lot of cases.

THE COURT: I suppose if you have the endurance.

MR. SNOW: I think I can keep up with Your Honor.

THE COURT: We may have to get another court reporter, as you gentlemen know, I get here at 6 and if you have the witnesses, we will get them tried.

[Vol. I, p. 42] MR. SNOW: We have the witnesses here from the Philippines.

THE COURT: We will start at 6 and run to 10.

MR. SNOW: This is all right with me, Your Honor.

MR. FIELDER: Your Honor, I wonder if I can read something into the record?

THE COURT: Sure.

MR. FIELDER: Citing from the *Apodaca* case, 522 F.2d 568, where the court has stated in this case on page 570: However the federal courts recognize two distinct privileges arising out of marital relationship, the first is previously noted, bars the testimony of one spouse as to confidential communications of the other, citing the *Hawkins* case which I previously cited. Second bars one spouse from testifying adversely to the other unless the other spouse consents.

THE COURT: Yes, I know. Do you want a couple more cases?

MR. FIELDER: Oh, I've got substantial—

THE COURT: I know, but you're reading something into that language that I do not believe the Tenth Circuit intended.

MR. FIELDER: All right. Your Honor, they cite the

Hawkins case which came out of the Tenth Circuit, which came out of the Supreme Court.

THE COURT: I know, but I don't read the language [Vol. I, p. 43] the way you do.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 76-CR-57

UNITED STATES OF AMERICA, *Plaintiff*

v.

EDWIN LEE ROBERTS, OTIS TRAMMELL, JR. AND JOSEPH FREEMAN, *Defendants*

TRANSCRIPT OF TRIAL PROCEEDINGS
June 21, 1976

Proceedings before the HONORABLE FRED M. WINNER, Judge, United States District Court for the District of Colorado, commencing at or about 8 a.m., Monday, June 21, 1976, in Courtroom E, United States Courthouse, Denver, Colorado.

APPEARANCES:

ROD W. SNOW, Assistant United States Attorney, appearing on behalf of the plaintiff.

ROBERT MALMAN, Attorney at Law, appearing on behalf of the defendant Edwin Lee Roberts, who was also personally present.

FREDERICK A. FIELDER, JR., Attorney at Law, appearing on behalf of the defendant Otis Trammell, Jr., who was also personally present.

ARTHUR M. SCHWARTZ, ERIC PRINGLE, RICHARD BACON, Attorneys at Law, appearing on behalf of the defendant Joseph Freeman, who was also personally present.

[RENEWAL OF OBJECTION TO THE TESTIMONY OF ELIZABETH TRAMMEL AND THE BEGINNING OF HER TESTIMONY]

[T. Vol. III, p. 112] ELIZABETH TRAMMEL,

called as a witness by the plaintiff, being first duly sworn, testified on her oath as follows:

MR. FIELDER: Your Honor, at this time I would again like to state to the Court, we object to this witness being even called into the courtroom by the prosecutor. She is an adverse witness and she is called by the prosecutor.

We object to her giving any testimony absent our giving consent to her testifying since there's a valid marriage. I would reference—and we have given no consent, Your Honor—I would reference the authorities we gave at the hearing last Thursday.

THE COURT: And you will receive exactly the same ruling. I don't agree with you and your objection will be noted and overruled.

[T. Vol. III, p. 113] MR. FIELDER: And I would state we have a continuing objection.

THE COURT: Well, to her testifying, you may have a continuing objection, but as to any particularized objection on any single question, you must state your objection.

MR. FIELDER: I will, Your Honor.

THE COURT: All right.

DIRECT EXAMINATION

BY MR. SNOW:

Q Would you state your name for the record, please, ma'am, and spell your last name.

A Elizabeth Ann Trammel.

Q And are you married, please, Elizabeth?

A Yes, I am.

Q To whom?

A Otis Trammel, Jr.

Q Where did you live in the spring and the summer of 1975?

A Angeles City, Philippines.

Q At that time were you married to Otis?

A I married Otis on the 13th of May, '75.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 76-CR-57

UNITED STATES OF AMERICA, *Plaintiff*

v.

EDWIN LEE ROBERTS, OTIS TRAMMEL, JR.,
JOSEPH FREEMAN, *Defendants*

VERDICT

We, the jury in the above entitled action, upon our oath, do say we find the defendant, OTIS TRAMMEL, JR., guilty, as charged in Count I, and guilty, as charged in Count II of the Indictment herein.

Dated this 24th day of June, 1976.

/s/ [Illegible]
Foreman

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 76-CR-57

UNITED STATES OF AMERICA, *Plaintiff*

v.

EDWIN LEE ROBERTS, OTIS TRAMMEL, JR.,
JOSEPH FREEMAN, *Defendants*

JUDGMENT AND PROBATION COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date July 16, 1976.

WITH COUNSEL Frederick A. Fielder, Jr.
PLEA entered: NOT GUILTY
There being a verdict of GUILTY.

Defendant has been convicted as charged of the offenses of import a Schedule I controlled substance (Heroin), in violation of Title 21, U.S. Code, Section 952(a) and Title 18, U.S. Code, Section 2; conspiracy to import a Schedule I controlled substance (Heroin), in violation of Title 21, U.S. Code, Section 963, 962(a).

The Court finds that the defendant is youth offender under Title 18, U.S. Code, Section 5005, et seq.,

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for treatment and supervision for an indeterminate period of time in lieu of a definite term of imprisonment pursuant to the Federal Youth Corrections Act, Title 18, U.S. Code, Section 5010(b), until discharged by the Federal Youth Corrections Division of the United States Board of Parole, as provided in Section 5017(c) of Title 18, U.S. Code. This sentence is imposed as to Counts 1 and 2, Count 2 to run concurrent with Count 1.

IT IS FURTHER ADJUDGED that the defendant be granted a stay of execution to July 23, 1976.

/s/ Fred M. Winner
FRED M. WINNER
U. S. District Judge

Date: July 16, 1976

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 76-1834

UNITED STATES OF AMERICA, *Plaintiff-Appellee*

vs.

OTIS TRAMMELL, JR., *Defendant-Appellant*

FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

(D.C. No. 76-CR-57)

OPINION-October 11, 1978

Joseph F. Dolan, United States Attorney (James L. Treece, former United States Attorney, and Rod W. Snow, Assistant U.S. Attorney on the brief), for Appellee.

Frederick A. Fielder, Jr., Fielder and Wiggins, P.C., for Appellant.

Before McWILLIAMS, BARRETT and McKAY, Circuit Judges

BARRETT, Circuit Judge

Otis Trammel, Jr. appeals his conviction, following a trial by jury, of the offenses of importation of heroin, 21 U.S.C.A. §952(a), and conspiracy to import heroin, 21 U.S.C.A. §§962(a), 963 (1970). Trammel was tried jointly with two co-defendants, Edwin Lee Roberts and Joseph Freeman. The three had been charged, by indictment, with importation and conspiracy to import heroin.

The three were charged with conspiracy to transport heroin from the Philippines to the United States and with the actual importation of heroin. None of the three defendants testified at trial. The government's case was substantially anchored to the testimony of two unindicted co-conspirators, Janice Keenan, a friend of Edwin Lee Roberts, and Elizabeth Trammel, wife of appellant Otis Trammel, Jr. Janice Keenan and Elizabeth Trammel had been granted immunity from prosecution in return for their testimony.

Prior to trial, appellant moved to sever his trial from that of Roberts and Freeman, or, in the alternative, to

prevent his wife, Elizabeth Trammel, from testifying against him.

On appeal, Trammel contends that the trial court committed reversible error by allowing his wife to testify against him over his objection and without his consent. He asserted, of course, the husband/wife privilege which prevents one spouse from giving testimony adverse to the other without his or her consent. We hold that the trial court did not err in admitting the testimony of Elizabeth Trammel.

The court did exclude evidence of confidential communications between the Trammels. However, the court denied Otis Trammel's assertion of the husband/wife testimonial privilege.

Trammel argues that the trial court erred in admitting the testimony of his wife, Elizabeth, against him because they were validly married at all times charged, the charges do not involve an assault by him against her and the charges do not involve an assault by him against children of their marriage. The Government argues that Elizabeth Trammel's testimony was properly admitted inasmuch as it was limited to acts as distinguished from *communications* and to statements of Otis Trammel made in the presence of third parties. Thus, the government reasons that the privilege does not arise. Further, the government contends that even if the communications could be considered confidential and privileged, still they would not be protected from disclosure where both spouses participated in the unlawful enterprise.

Trammel relies primarily on Hawkins v. United States, 358 U.S. 74 (1958). That opinion does re-affirm the long-standing common law rule which prohibits one spouse from either voluntarily or under compulsion testifying against the other spouse in a criminal prosecution wherein the other spouse is a defendant, unless the other spouse consents thereto. The Supreme Court stated that "The rule rested mainly on a desire to foster peace in the family and on a general unwillingness to use testimony of witnesses tempted by strong self-interest to testify falsely." 358 U.S. at p. 75. Nothing in *Hawkins* or any other reported decision, to our knowledge, prohibits the voluntary testimony of a spouse who appears as an unindicted co-conspirator under grant of immunity from the Government in return for her testimony.

The crux of the common-law rule in the case of a defendant husband, as here, is that the exclusion of the wife's

testimony is required in order to prevent ill feeling against her on the husband's part for her revelation of the truth. Thus, the privilege is that of the defendant spouse preventing the other spouse from testifying against him without his consent. Hawkins v. United States, *supra*; United States v. Apodaca, 522 F.2d 568 (10th Cir. 1975); United States v. Harper, 450 F.2d 1032 (5th Cir. 1971); United States v. Moorman, 358 F.2d 31 (7th Cir. 1966), *cert. denied*, 385 U.S. 866; Peek v. United States, 321 F.2d 934 (9th Cir. 1963), *cert. denied*, 376 U.S. 954 (1964).

Hawkins, *supra*, and other decisions involving the same issue, have stressed that the courts have the right and the responsibility to examine the policies behind the federal common law privileges and to alter, modify or amend them when reason and experience so demand.

In our view, a compelling need to alter or amend the commonlaw rule enunciated in *Hawkins* is dictated by "reason and experience" in the instant case. The witness, Elizabeth Trammel, was a co-conspirator, a participant in the heroin importation scheme and transaction. As such, she was subject to prosecution. The federal immunity statutes, 18 U.S.C. §§6001-6005, represent an accommodation between the right of the Government to compel testimony on the one hand, and the constitutional privilege to remain silent, on the other. United States v. Tramunti, 500 F.2d 1334 (2nd Cir. 1974), *cert. denied*, 419 U.S. 1079 (1974). The purpose of the grant of immunity is to reach the truth, and when that testimony is incriminatory, it cannot be used against the witness. The Congressional intent, then, is that the statutory claim of immunity be as broad as, but no broader than, the privilege against self-incrimination. Childs v. McGord, 420 F. Supp. 428 (D.C. Md. 1976), affirmed, 556 F.2d 1178 (4th Cir. 1977).

A defendant has no standing to contest the propriety of the grant of immunity to a witness. United States v. Rauhoff, 525 F.2d 1170 (7th Cir. 1975). Otis Trammel, as a defendant, thus was without standing to challenge the grant of immunity to his wife, Elizabeth, unless the privilege asserted by reason of the marital relationship is such that the rule of "reason and experience" mandates that the privilege asserted overrides the grant. We hold that it does not.

In our view the allegiance reaffirmed in *Hawkins*, *supra*, to the marital testimonial privilege grounded on the policy of preserving or fostering family peace must give ground to a greater, more compelling public need be-

fore us here. This case, unlike *Hawkins* and other like cases, involves the wife as a participant in the criminal transaction, subject to prosecution therefor. It matters not, in this context, that the witness granted immunity is the spouse of one of the defendants. The common law did not fail to recognize that the rule of privilege between husband and wife was subject to some exceptions, generally premised on the ground of necessity. The necessity was that of avoiding an extreme injustice to the excluded spouse which would ensue upon an undeviating enforcement of the rule. Accordingly, an exception which has been widely recognized in order to protect both the husband and wife arises in cases involving a crime perpetrated by one spouse against the other, termed a "personal wrong." The predicate, of course, is that it is illogical to believe that marital peace can be achieved or promoted by denying a wife who has been beaten, deserted or otherwise badly maltreated the right to testify against her husband about those wrongs. 8 Wigmore on Evidence, McNaughton Revision, Vol. VIII, §2239.

The various judicial utterances on the matter of the exercise of the privilege establish that the privilege belongs to the *party* spouse against whom the other is offered as a witness; however, it is firmly established that the privilege also belongs to the *witness* spouse. *See, generally*, 81 Am. Jur. 2d, Witnesses, Husband and Wife, §§148-171; Wigmore on Evidence, McNaughton Ed., Vol. VIII, Ch. 79, §§2227-2245; United States v. Cameron, 556 F.2d 752 (5th Cir. 1977).

None of the decisions applying the unvarying prohibition rule, i.e., that one spouse may not give testimony against the other without his or her consent, involve the fact situation presented here: Where both the husband and wife have jointly participated in a criminal conspiracy, both are subject to prosecution, and one spouse testifies against the interest of the other under grant of immunity. However, in United States v. Smith, 520 F.2d 1245 (8th Cir. 1975), the court held that in a prosecution of a husband and wife jointly charged with conspiracy, statements made by either inculpatory to the other during the course of and in furtherance of the conspiracy were admissible. *See, also*, 16 Am. Jur. 2d, Conspiracy, §41.

A claim of the Fifth Amendment privilege is a prerequisite to the grant of immunity. Thus, the constitutional privilege cannot be violated before it can be invoked. In the case at bar, then, Elizabeth Trammel did invoke her

Fifth Amendment privilege against self-incrimination. Having done so, she brought herself—as a party to the criminal transaction—within the rule that she who would have the benefit of the privilege must claim it.

This court has held that a defendant husband, in a criminal proceeding, cannot avail himself of the asserted marital privilege preventing the Government from presenting inculpatory testimony of his spouse where the marriage was found to have been entered into fraudulently. United States v. Apodaca, 522 F.2d 568 (10th Cir. 1975). We hold that, to like effect, a defendant husband who has jointly participated in a criminal conspiracy with his wife cannot prevail upon his claim of the marital privilege when his wife gives incriminating testimony under grant of immunity.

We have read and considered United States v. Williams, 447 F.2d 894 (5th Cir. 1971); Ivey v. United States, 344 F.2d 770 (5th Cir. 1965) and Peek v. United States, *supra*. These opinions stand for the bald rule that the testimony of a spouse who is a co-conspirator in the same transactional criminal charges brought against the other spouse cannot testify against the charged spouse in derogation of the husband-wife privilege. These decisions, significantly, do not involve the testimony of a spouse given under grant of immunity. Thus, the "balancing test" function was not brought into play in the above cited opinions.

The applicable rule and reason, in our view, is that applied in United States v. P. Van Drunen, 501 F.2d 1393 (7th Cir. 1974), *cert. denied*, 419 U.S. 1091 (1974). There the defendant's wife was permitted to testify against him relative to matters involving the illegal transportation of an alien which *both* spouses participated in. There was no grant of immunity involved in the case. The court recognized that *Hawkins*, *supra*, was arguably a barrier to the result reached but concluded:

> . . . here, we think that goal (that of preserving the family) does not justify assuring a criminal that he can enlist the aid of his spouse in a criminal enterprise without fear that by recruiting an accomplice or coconspirator he is creating another potential witness.
>
> We do not view *Hawkins* as controlling . . . . The Supreme Court has since announced an exception to *Hawkins* for cases where one spouse commits a crime against another (Wyatt v. United States, 362 U.S.

525, 80 S.Ct. 901, 4 L.Ed.2d 931) and we decline to read the *Hawkins* opinion as foreclosing the possibility of other exceptions not discussed therein.

501 F.2d, at pp. 1396, 1397.

Fed. Rules Evid. Rule 501, 28 U.S.C.A. does not recognize a per se marital privilege rule. It does state the general rule of privilege to be ". . . governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Thus, several courts, including this court, have followed the rule we here apply involving similar husband-wife conspiracy transactions. Baker v. United States, 329 F.2d 786 (10th Cir. 1964), *cert. denied*, 379 U.S. 853 (1964); United States v. Pugliese, 153 F.2d 497 (2nd Cir. 1945).

Immunity statutes have been characterized as essential to the effective enforcement of criminal statutes. Kastigar v. United States, 406 U.S. 441 (1972). Inasmuch as the constitutional guarantees against self-incrimination apply solely for the benefit of a witness in danger of actual conviction (such as Elizabeth Trammel in the instant case), otherwise privileged testimony involving self-incriminating matters may be required.

Exceptions to the common-law rules excluding privileged testimony by one spouse against the other in a criminal prosecution must be made in order to effect the beneficent purposes of the rule. In keeping with the mandates of Rule 501, *supra*, federal courts must determine on a case-to-case basis whether "reason and experience" dictates the alteration or amendment of the marital privilege. In the present case, we believe that there are certain factors which, for all practical purposes, indicate that the testimony of Elizabeth Trammel was not the "death knell" to the existence of the marriage. The parties were extensively engaged in criminal activities shortly following their marriage on May 31, 1975. The record fairly evidences that commencing in August of 1975, Otis Trammel, Jr., (Elizabeth's husband), Edwin Lee Roberts and Joseph Freeman conspired and "masterminded" the scheme to accomplish importation of heroin into the United States from Thailand. Elizabeth Trammel may or may not have freely consented to her participation in the scheme. The record fairly reflects, we believe, that

both Elizabeth Trammel and Janice Keenan were "conduits" or "actors" to accomplish the illicit goals of the scheme. They were being "used." Whether they participated voluntarily or otherwise at all times is a matter for rank conjecture. The record is clear, however, that when their participation in the conspiratorial enterprise was discovered by federal DEA agents who then confronted them, each agreed to cooperate with the federal agents, and they did so. The record evidences that each woman followed instructions from the three charged co-conspirators. Neither planned nor "masterminded" the importation scheme. The same is not true of appellant Otis Trammel, Jr.

It is inconceivable that the Trammels established a "home" with any of the usual, ordinary attributes of "family life." There was no domestic harmony in the commonly accepted nature of a marital relationship to be preserved following commencement of the criminal activities in August of 1975. Beyond this, the nature of the criminal activities pursued all despicable and completely alien to anything conducive to the preservation of a family relationship built around the legal status of marriage. The conduct of the parties shortly following their marriage to the time of appellant Trammel's arrest lent absolutely nothing in building upon, preserving or fostering "family peace" not only "for the benefit of husband, wife and children, but for the benefit of the public as well." Hawkins v. United States, *supra*, at pp. 77, 79.

The facts and circumstances reflected by this record mandate the exception referred to in *Hawkins*, *supra*, and Rule 501, *supra*. The illicit heroin importation activities pursued by the parties would have effectively denied the establishment of "family peace" which could in anywise have been alienated by Elizabeth Trammel's testimony. Thus, reason and experience dictate that the marital privilege rule could not be invoked by appellant Trammel. The law does not force or encourage testimony which would likely alienate husband and wife, or inflame "existing domestic differences." The overriding benefit to be served in this case has been properly served by the action of the trial court: that of bringing to the bar of justice those who have committed grievous criminal acts which most assuredly have been to the breakdown and destruction of many family units and marital relations involving illicit trafficking and use of dangerous drugs and narcotics.

WE AFFIRM.

No. 76-1834—UNITED STATES OF AMERICA, *Plaintiff-Appellee*, *v.* OTIS TRAMMEL, JR., *Defendant-Appellant.*

MCKAY, dissenting:

Mr. and Mrs. Trammel have not only wasted their young lives and exploited the weaknesses of drug addicts for profit, but by their sordid activities they have led us to today's decision to establish a rule for future cases which is unsound and contrary to established precedent. In so doing they have caused us to ignore some time honored presumptions, to forego an opportunity to continue a modest contribution to the withering but vital institution of the family, and to further expand the already excessive role of the doctrine of conspiracy in undermining fundamental rules of law.

If today's opinon affected only Otis Trammel and his wife, I would view it with some concern but not with the degree of apprehension expressed in this dissent. The significance of today's decision is that it establishes a policy for *every* future case in which a prosecutor exercising his essentially unreviewable discretion decides to *accuse* a married couple as coconspirators. While the testimony in this case does not portray the defendant as a person deserving of great sympathy, tomorrow's case may involve a financially troubled couple who appear to be model spouses but are *accused* of conspiracy to file a false tax return. When, under the rule of this case, the wife is offered a chance to avoid a *possible* conviction by testifying against her accused husband, the harm the testimonial privilege seeks to prevent will have been done.

An analysis of the issues presented by this case requires a recognition that there are two distinct privileges based on the marital relationship. The spousal testimony privilege prevents one spouse from giving testimony adverse to the other, either voluntarily or under compulsion, without the other's consent. *Hawkins v. United States*, 358 U.S. 74, 77 (1958). The confidential marital communication privilege bars introduction of any confidential communications between spouses. *United States v. Apodaca*, 522 F.2d 568, 570 (10th Cir. 1975). Only the first privilege is at issue in this case.

In overturning a decision of this circuit, the Supreme Court affirmed in *Hawkins v. United States*, 358 U.S. 74

(1958), that the testimonial privilege is the law in the federal courts. The decision sets forth the parameters of the rule. In *Hawkins* a man was accused of transporting a girl from Arkansas to Oklahoma to work with his wife as a prostitute. As in the case before us, the wife was an alleged participant in criminal activity. Unlike the record in this case, however, the evidence showed that the marriage was already in trouble and the parties were living apart. The court treated the wife's testimony as voluntary, but it reaffirmed the testimonial privilege. Reasoning that the rule is grounded on the sound policy of fostering "family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well," the Court declared that even if the marriage was not an ideal one "the law should not *force or encourage* testimony which might alienate husband and wife, or further inflame existing domestic differences." *Id.* at 77, 79 (emphasis supplied).

This rule has been acknowledged by federal courts in cases where the spouses were alleged coparticipants in crimes. *See, e.g., United States v. Williams*, 447 F.2d 894, 897–98 (5th Cir. 1971); *Ivey v. United States*, 344 F.2d 770, 772–73 (5th Cir. 1965); *Peek v. United State*, 321 F.2d 934, 943 (9th Cir. 1963), *cert. denied*, 376 U.S. 954 (1964).[1] The Tenth Circuit decision relied on by the majority, *Baker v. United States*, 329 F.2d 786 (10th Cir.), *cert. denied*, 379 U.S. 853 (1964), was a case in which the testimonial privilege was not even asserted by the defendant. Indeed, the majority acknowledges the general rule but urges an exception. I respond to the reasons given for this departure from established policy and precedent in the order presented by the majority.

It is urged that *Hawkins* grants a license for this court to "alter, modify or amend [the testimonial privilege] when reason and experience so demand." I am not certain that *Hawkins* provides such an expansive grant. Although I recognize that other circuits have acted to modify the

[1] One case seems clearly contrary, but it involved testimony of events occurring prior to marriage and reflected the impact of Rule 505(c) of the proposed Federal Rules of Evidence, which excepted such testimony from the scope of the privilege. United States v. Van Drunen, 501 F.2d 1393 (7th Cir.), *cert. denied*, 419 U.S. 1091 (1974). Two additional cases contain language suggesting a narrowing of the privilege, but they did not involve calling the other spouse as a witness. United States v. Mackiewicz, 401 F.2d 219 (2d Cir.), *cert. denied*, 393 U.S. 923 (1968); United States v. Pugliese, 153 F.2d 497 (2d Cir. 1945).

privilege, *e.g.*, *United States v. Van Drunen*, 501 F.2d 1393 (7th Cir.), *cert. denied*, 419 U.S. 1091 (1974), I also recognize that the Supreme Court has suggested that changes in the privilege are best left to Congress or to the Court itself.[2] *Hawkins v. United States*, 358 U.S. at 78. At the very least, we should be cautious about eroding the privilege on the impetus of a solitary case. In this regard, we should be guided by the counsel of Mr. Justice Stewart, the lone doubter in *Hawkins*, who observed in concurrence that "[i]t is obvious, however, that all the data necessary for an intelligent formulation 'in the light of reason and experience' could never be provided in a single litigated case." *Id.* at 82 n.4. As an alternative to such a precipitate resolution of the issue, he proposed that a judicial committee be established to gather appropriate information and incorporate it into adequately considered rules. Whatever course proves ultimately wise, I do not think this case presents an adequate factual setting in which to make today's sweeping choice.

The majority insists that the federal immunity statutes, 18 U.S.C. §§ 6001–6005 (1976), provide justification for the proposed exception. These are irrelevant. They address only the Fifth Amendment rights of the declarant. The majority itself acknowledges that Congress intended by the rule a grant no broader than the Fifth Amendment itself. But the testimonial privilege extends beyond the declarant to the accused spouse, and the immunity statutes say nothing about his privilege. The immunity provisions are based on the notion that there is no injustice in compelling a witness to testify in the face of Fifth Amendment proscriptions as long as he will not be subject to prosecution for his testimony. This *quid pro quo* rationale has no application to the situation under consideration here, for no such bargain is struck with respect to the accused spouse. The immunity statutes simply provide no sound justification for fashioning a new exception to the privilege. The majority nonetheless believes that the perceived injustice of excluding immunity-enshrouded testimony is sufficient to justify an erosion of the testimonial privilege. To me this view is inconsistent with the mandate of *Hawkins* and its reluctance

[2] 18 U.S.C. § 3771 (1976) vests in the Supreme Court the power to prescribe rules of pleading, practice, and procedure for criminal cases in federal courts.

to abandon the "persistent instincts of several centuries" that have culminated in the privilege. 358 U.S. at 79.

The majority seems to imply that something inherent in the doctrine of conspiracy itself justifies overturning the privilege. Even assuming the doubtful proposition that conspiracy has such a sweeping scope, applying the doctrine to overcome the testimonial privilege ignores significant procedural ramifications. Under present practice in this circuit, the mere *allegation* of conspiracy would permit the admission of the wife's testimony *before* the truth of the conspiracy allegation is established. In this procedural framework, the destruction of the privilege would not only effectively overturn the presumption of innocence with respect to the conspiracy charge, but it would accomplish the harm forbidden by *Hawkins* before either judge or jury has determined that there was any conspiracy at all.

I confess inability to comprehend what it is in the record of this case that supports the propositions that the Trammels did not have a "home," that they had no "family life" or that there was no "domestic harmony in the commonly accepted nature of a marital relationship." The trial court did not address these questions. Presumably the propositions reflect a view that spouses who commit crimes are incapable of achieving a harmonious marriage. I am not convinced that this view is a sound one, and I discern no support for it in the majority opinion. Even if there were evidence of domestic disharmony virulent enough to destroy family life, this would offer no justification for distinguishing the *Hawkins* precedent. The Supreme Court reached its decision in that case in the face of actual evidence of severe marital discord. 358 U.S. at 82 n.4. It should also be remembered that the Supreme Court was not only loath to alienate husband and wife in a model marriage, but was concerned about inflaming existing differences in a stressful one as well.

I should also say a word about the conflict between the government's interest in obtaining evidentiary support for its accusations and society's interest in perpetuating a privilege intended to promote family unity. All of the arguments about evidentiary needs are equally applicable to the protections of the accused incorporated in the Bill of Rights. While not found in the Bill of Rights, the common law privilege at issue here reflects societal values similar to those expressed in that document. Today's rule articulates an unsound policy to the extent that it gives the prosecutor

discretion to determine which home shall be worth saving and which home shall not have the benefit of the common law privilege. While the majority may be upholding important societal values in reaching the result it does, it seems to me that the principle established in this case strikes at one of the few remaining public supports for the institution of the home. And the home is, after all, a more important contributor to law and order than is prosecution. If the homes fail, no number of prosecutors, judges or jails could stem the tide of ensuing crime. While the Trammel home is perhaps far from an ideal one, the principle established in this case applies to all accused couples and makes us unwitting partisans in the continuing assaults on the stability of the home—the root of true stability in any society.

In the Supreme Court of the United States

No. 78–5705

OTIS TRAMMEL, JR., *Petitioner*

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO the United States Court of Appeals for the Tenth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

February 26, 1979